

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 2016

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant has requested information from the Foreign and Commonwealth Office ('the FCO') on files listed by the National Archives but retained by the FCO. The FCO confirmed that it holds information relevant to the requests. It repeatedly advised the complainant that it requires further time to consider the public interest test. In respect of the additional requests, made following the delays, the FCO is yet to acknowledge or respond to the complainant. To date, the FCO has failed to provide the complainant with any substantive responses. By failing to do so the Commissioner has concluded that the FCO breached section 17(3) and section 10(1) of the FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with substantive responses to his information requests. If the FCO decides to withhold any information then the complainant should be provided with a refusal notice giving a full explanation as to why the information will not be disclosed, including details of any public interest test considerations.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant wrote to the FCO with four identical requests related to different retained files on 3 July, 24 July and two on 6 September 2015. He requested information in the following terms:

i) "File: FCO 31/2462 - Legal action against HM Government in British Indian Ocean Territory

Dated: 1 Jan 1978 to 31 Dec 1978

Former reference JEZ 376/1 PART A

The above file is listed by the National Archives as "Temporarily Retained by Department".

My FOI request is for copies of all documents (including minute sheets) contained in this file. Please could these be supplied in scanned electronic format (PDF) if possible. If this is not possible then photocopies will suffice. Please could these be supplied regardless of whether any decision is now made to release the file back to the National Archives."

ii) File: FCO 31/2194 - Legal action against UK in British Indian Ocean Territory: case of Michael Vencatassen v. The Crown, alleging assault and wrongful removal from Diego Garcia

Dated: 1 Jan 1977 to 31 Dec 1977

Former reference JEZ 376/548/1 PART D

The above file is listed by the National Archives as "Temporarily Retained by Department".

My FOI request is for copies of all documents (including minute sheets) contained in this file. Please could these be supplied in scanned electronic format (PDF) if possible. If this is not possible then photocopies will suffice. Please could these be supplied regardless of whether any decision is now made to release the file back to the National Archives."

iii) File: FCO 31/2463 - Legal action against HM Government in British Indian Ocean Territory

Dated: 1 Jan 1978 to 31 Dec 1978

Former reference JEZ 376/1 PART B

The above file is listed by the National Archives as "Temporarily Retained by Department".

My FOI request is for copies of all documents (including minute sheets) contained in this file. Please could these be supplied in scanned electronic format (PDF) if possible. If this is not possible then photocopies will suffice. Please could these be supplied regardless of whether any decision is now made to release the file back to the National Archives."

iv) File: FCO 31/2464 - Legal action against HM Government in British Indian Ocean Territory

Dated: 1 Jan 1978 to 31 Dec 1978

Former reference JEZ 376/1 PART C

The above file is listed by the National Archives as "Temporarily Retained by Department".

My FOI request is for copies of all documents (including minute sheets) contained in this file. Please could these be supplied in scanned electronic format (PDF) if possible. If this is not possible then photocopies will suffice. Please could these be supplied regardless of whether any decision is now made to release the file back to the National Archives."

5. The FCO responded on the following dates:

For request i) 3 August, 1 September, 30 September, 27 October and 22 December 2015.

For request ii) 21 August, 21 September, 19 October, 16 November, 14 December 2015, 15 January and 22 January 2016.

For request iii) 5 October, 2 November, 30 November and 31 December 2015.

For request iv) 5 October, 2 November, 30 November and 31 December 2015.

On each of the 20 occasions the response was identical. The FCO advised that it required more time to consider the Public Interest Test in relation to Section 27 of the FOIA. To date no substantive response has been received.

6. On 28 October 2015 the complainant wrote to the FCO expressing his dissatisfaction at the continued delay in respect of his first request. He

requested an explanation of the exceptional circumstances requiring such lengthy consideration. He asked:

"I would therefore request that you conclude your consideration and either release the information requested or issue a final refusal notice and that this be done by Tuesday 10 November 2015 at the latest (10 working days). If in the alternative you would wish to justify the extension on the basis of exceptional reasons then please would you let me know what these are.

With your reply please would you supply a 'List of Documents' contained in the File that fell within the scope of my request (both of the documents to be released and those that you consider to be exempt). If you do not consider that my original request covered a list of documents, then please treat this as a request for such a list."

7. The complainant wrote to the FCO again, in the same way, on 2 and 3 November 2015 in respect of his other requests.
8. The FCO has not acknowledged or responded to the complainant's subsequent requests for a 'List of Documents'.

Scope of the case

9. The complainant contacted the Commissioner on 17 November 2015 to complain about the way his requests for information had been handled. He was concerned about the FCO's notification of the continual delays without providing any explanation of the exceptional circumstances requiring such prolonged consideration. The complainant also referred to the FCO's lack of engagement with his additional requests as set out in paragraphs 6 and 7.
10. The Commissioner initially contacted the FCO by telephone on 17 December 2015. The FCO advised the Commissioner that a 'stakeholder meeting' was planned for early January 2016, after which responses would be provided to the complainant by mid-January.
11. The complainant contacted the Commissioner on 1 January 2016 to advise him that, following the Commissioner's intervention, for the first time the FCO had included in its letters of 22 and 31 December the following statement:

"However, complex issues are involved requiring an extensive consultation process with a number of internal and external stakeholders."

12. The complainant contacted the Commissioner on 23 January 2016 to advise that he had not received any substantive response. On 25 January 2016 the complainant forwarded a copy of a brief email from the FCO advising him that he would receive responses 'as soon as possible'.

Reasons for decision

13. Section 1(1) of the FOIA provides that any person making a request for information to a public authority is entitled:

'(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

14. Section 10(1) of the FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt. The Commissioner therefore finds the FCO in breach of s10(1) in respect of the requests for a 'list of documents'.
15. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response including public interest considerations by up to a further 20 working days, which would allow a public authority 40 working days in total. Any extension beyond 40 working days would require there to be exceptional circumstances, fully justified by the public authority.
16. In the circumstances of this case, although the FCO has repeatedly informed the complainant of the delay while the public interest is considered, the total time taken has well exceeded 40 working days. Even if exceptional circumstances may prevail, the Commissioner's position is that no public authority should still be deliberating about a substantive response, including the balance of the public interest test, after so many months (7 months from the date of the first request and in excess of 5 months for the remaining requests. As the Commissioner does not consider this to be a reasonable timescale he finds that the FCO has not complied with section 17(3).

Right of appeal

17. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

18. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
19. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF